Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

MICHAEL J. TEMPESTA,

Petitioner,

v.

MOTOROLA, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *McDonnell Douglas v. Green* (1973), this Court articulated a rule of law for the circumstantial proof of an individual disparate treatment employment discrimination case. The *McDonnell Douglas* rule has been refined and explained by the Court, most recently in *Reeves v. Sanderson Plumbing* (2000). In *Reeves* the Court explained that at the "pretext" stage ordinarily evidence sufficient to prove pretext is also sufficient to prove discrimination, because the plaintiff-employee's *prima facie* case plus the proof of pretext will eliminate most non-discriminatory reasons for the employer's action, leaving discrimination as the most likely alternative explanation. However, the Court also included in its opinion a proviso that there might sometimes be factual circumstances where a jury could not rationally infer the fact of discrimination from the fact of a pretextual reason having been given by the employer (the "*Reeves* Exception"). The *Reeves* Exception applies, "if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred."

In this case the question presented is whether, at the pretext stage in an employment discrimination case, the reviewing court may, in reliance on the *Reeves* Exception, routinely place an additional evidentiary burden on the plaintiff-employee, namely a weighing of his evidence of pretext against the defendant-employer's proffered evidence of its "non-discriminatory" reason, to test whether the plaintiff's evidence may be found wanting as "weak" compared with the defendant's, and then grant summary

judgment to the defendant if that weighing is unfavorable to plaintiff, in spite of the fact that the plaintiff has provided sufficient evidence of pretext from which a rational jury could have found the defendant's proffered non-discriminatory reason to be unworthy of belief, while at the same time refusing to review the evidentiary record as a whole.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Silver, D.J.) granting in part the defendants' motion for summary judgment, denying it in part, and denying Petitioner's cross-motion for partial summary judgment (Appendix ("Pet.App.") 20a-49a), is an unpublished opinion. The district court's subsequent opinion (per Young, D.J.) denying Petitioner's motion for reconsideration, granting Defendants' motion for reconsideration and ordering that judgment be entered (Pet.App. 8a-19a) is also unpublished. The court of appeals' opinion (per Roney, Hug and Thomas, JJ.) affirming the district court (Pet.App. 1a-7a) is also unpublished. Finally, the court of appeals' order denying rehearing (Pet.App. 52a) is unpublished.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on October 30, 2001, and denied rehearing on December 28, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of Title VII of the Civil Rights Act ("Title VII"), the Age Discrimination in Employment Act (the "ADEA") and the Arizona Civil Rights Act ("the ACRA") relevant to this petition are reprinted in the Appendix at 53a-54a.

STATEMENT OF THE CASE

Petitioner Michael Tempesta used to be employed by Defendant Motorola, Inc. This Petition relates to Tempesta's claim that Motorola retaliated against him because he complained about age and gender discrimination (that is, discrimination against older employees and particularly older males) in the department where he then worked, Purchasing.

The district court for the District of Arizona heard Tempesta's retaliation claim on cross-motions for summary judgment. Although the district court agreed that Tempesta has made his *prima facie* case under *McDonnell-Douglas*, it found that there was insufficient evidence for Tempesta to avoid summary judgment – even though Tempesta had argued that he had sufficient evidence so that *he* should have prevailed on summary judgment. The Court of Appeals for the Ninth Circuit affirmed. In reaching its decision the circuit court relied on the *Reeves* Exception, and declined to review all the evidence in the record before reaching its decision. In particular, it failed to consider Tempesta's *prima facie* evidence it impermissibly considered the facts in the light most favorable to Motorola, and it weighed credibility, thus encroaching on the jury's territory.

The Court of Appeals' decision merits this Court's review because it flies directly in the face of this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000), and because there is now a split in the circuits concerning the interpretation of *Reeves*, and in particular, the interpretation of the *Reeves* Exception.

1. Tempesta was a Motorola employee from December 1983 until he was terminated, supposedly for "job abandonment" in April 1996. Tempesta worked at various

positions during this time. Of relevance to this petition, his first position was working with chemicals, but he developed respiratory problems as a result of his exposure to those chemicals, and also suffered severe burns that resulted in a plastic surgery referral. In September 1985, Motorola had Tempesta examined by a physician, who placed Tempesta on a "lifetime" restriction from working around acids and fumes.

From 1985 through 1991, Tempesta worked in various positions including polishing, wafer inspection, personnel, and quality assurance. He was a quality assurance inspector for several years. Because of a workplace injury, however, Tempesta was "temporarily" reassigned in 1991 to the System Support (data entry) section of the Purchasing Department. Larry McLaughlin was the Supervisor of the System Support section, and he reported to Terry Hanley, the Manager of the System Support section.

In early 1993 Supervisor McLaughlin hired Tempesta as a permanent System Support employee. In February 1994 Kathy Hand became Director of Purchasing. After Director Hand took over Purchasing, Tempesta began to notice that her decisions for promotions and hiring in Purchasing reflected a bias towards women, and particularly younger women, at the expense of the men particularly older men. Beginning in early 1994, and throughout the remainder of his employment, Tempesta openly, and regularly, voiced these concerns to Director Hand, to Manager Hanley and to Director McLaughlin. At the end of May 1995 Tempesta sent a lengthy e-mail to Motorola's internal "EEOC" department complaining about discrimination against men in the Purchasing Department, following it up with another e-mail the next day raising age and gender discrimination issues.

2. Within days of his first contacting Motorola's EEOC Department, Tempesta was called into a meeting with Supervisor McLaughlin, Director Hand, Joann Hardwick (the second person who worked in data entry), and a person from Human Resources. Supervisor McLaughlin shown Tempesta a chart that he had prepared, showing a downturn in some of the work done in data entry and told Tempesta that the chart justified eliminating either his job or Joann Hardwick's and that Tempesta's had been chosen.

3. Under Motorola's standard practice, Tempesta was given a period of time[1] to find another position at Motorola. Tempesta made efforts to obtain a replacement job at Motorola and kept weekly notes on the positions he applied for. In addition, Tempesta visited an internal job placement service twice a week in June 1995, and applied for at least sixteen of the jobs he learned of there. Tempesta was, however, unable to find a replacement position. During the period of time when he was searching for a new position, he write to Charles Burtner, the District Director of the United States Equal Employment Opportunity Commission, saying that Motorola was retaliating against him.

4. Very soon after it had informed Tempesta that it was "eliminating" his job, Motorola offered Tempesta a job working with chemicals, in spite of Motorola's knowledge of his "lifetime" restriction and of his prior respiratory problems and burns from the same chemicals. Tempesta protested at this "offer." There followed a long dispute between Motorola and Tempesta about whether he was indeed medically restricted from the chemical handling position, a dispute which continued through until April 1996,

1. The parties disagreed about how long a period was usually given – but there is no dispute that this was Motorola's practice.

when Motorola finally fired Tempesta, supposedly for "job abandonment" because he would not report for work at the chemical handler position. Throughout the dispute Tempesta continued to protest about discrimination, including a meeting with a senior person in Motorola's Human Resource Department, and writing to a Vice-President supervising Human Resources and the United States Department of Labor, Office of Federal Contract Compliance Programs. For the purposes of this petition what is of most significance is that Motorola knew that the chemical handling position was the one position that Tempesta did not want – Motorola knew this not only because of Tempesta's protestations at the time he was offered the job, but because of Tempesta's history of respiratory problems and burns working around those same chemicals. Motorola *gave no explanation to Tempesta then, and has still provided no explanation* of why this was the one job it offered to Tempesta, and why Motorola was so insistent that that would be the job he would take.

5. The decision to "eliminate" Tempesta's Purchasing job was very suspect in the first place. The "chart" on which Director McLaughlin relied showed only that the work reflected in the chart could be done by one person. But the work reflected in the chart was (as Motorola never disputed) restricted to particular categories of data entry work that in fact only one person *was* doing at that time – Joann Hardwick. By the time the chart was prepared and used to justify "eliminating" Tempesta's job he had, for a long time, being doing, virtually exclusively (except on the occasions when Hardwick particularly asked for his help on a computer screen), *different* work which was not reflected at all on the "chart." In other words the work supposedly only sufficient for one person was being *done only by one person*, so that

the "chart" did not justify *any* job elimination. To add to the suspicious circumstances, not long before the meeting in which Tempesta was told his job was being eliminated, he had also been told by Director McLaughlin that he could no longer do equipment maintenance, something that had been part of his job duties for four years. No explanation has ever been provided for this action, either.

Tempesta in fact continued to do his job in Purchasing after it was "eliminated," until mid-July 1995, when he was asked to clean out his desk and leave. Within days of Tempesta's job being "eliminated," Motorola had an intern placed in Purchasing to cover Tempesta's duties, and had Tempesta train the intern in how to perform those duties. Tempesta's job duties did not "go away" – other witnesses in Purchasing supported Tempesta's evidence that his job duties continued despite his job being "eliminated."

6. Tempesta filed a *pro per* complaint in the district court, on February 20, 1996, alleging violations of the ADEA, Title VII, the Americans with Disabilities Act (the "ADA"), the ACRA, and for violation of public policy, intentional infliction of emotion distress and breach of contract. The district court had "federal question" jurisdiction, 28 U.S.C. § 1331, under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e through 2000e-17, the ADEA, 29 U.S.C. §§ 621 through 634, pursuant to 42 U.S.C. § 2000e-5, the ADA, 42 U.S.C. §§ 12101-12133, pursuant to 42 U.S.C. 2000e-5, and the Arizona law claims under supplemental jurisdiction, 28 U.S.C. § 1367. The complaint was later amended to include as Defendants, a co-worker, Sheila Jones (and her husband, Timothy, for purposes of reaching community property with a judgment) for intentional interference with contract.

7. By the time this case reached the dispositive motion stage, Tempesta had acknowledged that the heart of his federal and state discrimination claims was retaliation, for his complaints about age and gender discrimination in the Purchasing Department at Motorola under Manager Hand's leadership, and that the offering of the chemical job was not a separate act of "disability" discrimination but all part of the same retaliation. Tempesta accordingly refocused his discrimination claims specifically on retaliation, based on the prohibitions against retaliation to be found in the ADEA (29 U.S.C. § 623(d)), Title VII (42 U.S.C. § 2000e-3(a)) and the ACRA (Ariz. Rev Stats. 41-1464(A)), since he had complained specifically about age and gender discrimination. Judge Silver noted that the analysis for retaliation under the ADEA and Title VII was identical and that the Arizona courts generally look to federal law in interpreting in ACRA. Pet.App. 34a and 41a.

The district court found that Tempesta had made out a *prima facie* case of retaliation. Pet.App. 38a. Judge Silver also decided that Motorola had provided an explanation for the elimination of Tempesta's job. Pet.App. 38a-39a. Judge Silver never addressed the fact that Motorola had provided *no* explanation for the elimination of Tempesta's equipment maintenance duties, before the "elimination" of his job, or for offering him, and only offering him, the chemical handling job as a substitute position. Moreover, Judge Silver concluded that Tempesta had provided insufficient evidence of pretext or other evidence of retaliation to withstand summary judgment.

Tempesta's motion for reconsideration of Judge Silver's ruling on his retaliation claim came before a second district judge (Judge Silver recused herself when Defendants retained

new counsel), Judge Young, who denied the motion. Both Judge Silver's decision and Judge Young's decision were before June 2000, when this Court decided *Reeves*.

8. Tempesta timely appealed to the Ninth Circuit. Tempesta specifically argued that his evidence must be evaluated under the *Reeves* standard, but Appellees argued that this case came under the *Reeves* Exception. The circuit court agreed with Appellees, and evaluated Tempesta's case without ever considering his *prima facie* case at all, without considering the facts in the light most favorable to Tempesta, impermissibly weighing the strength of Tempesta's explanation (it was found to be "weak") against Motorola's (once again restricting the review to the explanation for the elimination of Tempesta's job – and deciding that Motorola had "abundant and uncontroverted evidence that no discrimination had occurred"), so that the district court had correctly decided that Tempesta had failed to meet his burden on pretext. Pet.App. 3a-5a.

9. This timely petition followed.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. *First*, the decision of the Court of Appeals for the Ninth Circuit in this case is contrary to the opinion of this Court in *Reeves v. Sanderson Plumbing*. *Second*, Tempesta is not the only case where the Ninth Circuit has similarly misapplied *Reeves*. Nor is the Ninth Circuit the only federal court to have similarly misapplied *Reeves*. The scholarly commentary on the *Reeves* decision had widely predicted that the split in the circuits created after *Hicks v. St. Mary's Honor Center*, 509 U.S. 502, 113 S. Ct. 2742 (1993), which the Court

granted certiorari in *Reeves* to resolve, would in fact continue after *Reeves*, precisely because of the *Reeves* Exception and interpretations likely to be given to that exception. Accordingly, the Ninth Circuit decision in this case is no aberration, but rather it represents an interpretation of *Reeves*, although patently an incorrect one, which has gained, and is continuing to gain, footholds in the federal courts.

I. Certiorari Is Warranted Because the Decision below Conflicts with this Court's Decision in *Reeves*

The Ninth Circuit's holding that Tempesta failed to present sufficient evidence of pretext to avoid summary judgment conflicts with two important principles settled by this Court in *Reeves*, and misapplies the *Reeves* Exception, which must be interpreted in light of those two principles. The first principle is that evidence that the defendant-employer's proffered non-discriminatory reason is not worthy of credence is evidence that the real reason was discriminatory. *Reeves* serves to remind the lower courts that the purpose of the *McDonnell Douglas* framework is to provide for a manner of proving intentional discrimination by eliminating alternative explanations for adverse actions taken by the employer. The *prima facie* case has already eliminated the most obvious alternatives: if then the employer's proffered explanation is shown to be unworthy of belief, ordinarily discrimination will be left as the most likely alternative. The *Reeves* Exception concerns those cases that are out of the ordinary – where the evidentiary record shows another alternative to discrimination that a rational jury would have to accept as the true reason.

The second principle is that in an employment discrimination case, just because a *McDonnell Douglas* shifting burden framework has been employed with its different "stages" of production of evidence does not mean that the reviewing court can excuse itself from its customary burden on summary judgment of reviewing all of the evidence in the record in considering what a rational jury could find: moreover, in doing so the reviewing court must not overstep its bounds into the province of the jury and substituting its views of credibility and persuasiveness for those of the jury.

A. The Decision below Conflicts with the Holding of this Court in *Reeves* in that it Misconstrues the Circumstances under which the *Reeves* Exception Applies

Prior to *Reeves* many lower courts had failed to accord sufficient evidentiary weight to a plaintiff-employee's proof that its employer's proffered explanation for its actions was unworthy of belief. This Court made clear in *Reeves*, reasoning from basic evidentiary principles, that a plaintiff's proof of pretext can indeed be powerful proof, entitled to considerable weight. The Court reasoned that:

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a

> party's dishonesty about a material fact as "affirmative evidence of guilt." Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

530 U.S. at 147, 120 S. Ct. at 2108-9, citations omitted.

As the above reasoning demonstrates, the only circumstances under which it would not be rational to make "[s]uch an inference", i.e. from the fact of pretext to the fact of dissembling to cover up a discriminatory motive, would be where there is sufficient additional credible evidence in the record that although the dissembling was indeed present it was dissembling to cover up some **third alternative**, not discrimination.

To explain how a reviewing court must account for the possibility of such circumstances, the Court continued its analysis by setting forth the proviso referred to in this petition as the *Reeves* Exception:

> This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance an employer would be entitled to judgment as a

> matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

530 U.S. at 148, 120 S. Ct at 2109. From the Court's reasoning to reach its first principle in *Reeves* and from the cases to which the Court cites to illustrate its proviso, it is apparent that the *Reeves* Exception applies in those usual cases where the evidence reveals a third alternative to explain the employer's actions, so much more persuasive than the inference of discrimination that a rational jury would have to believe it as the true explanation over discrimination. It is, therefore, a serious misapplication of *Reeves*, one which completely undermines the first principle articulated in *Reeves*, for a reviewing court to even attempt to apply the *Reeves* Exception **unless** the evidentiary record before it reveals ("conclusively" or on "abundant and uncontroverted independent" evidence) that the true explanation for the employer's actions is **neither** its explanation proffered at the second stage of the McDonnell Douglas burden-shifting **nor** the discriminatory explanation offered by the plaintiff, but rather some third explanation. If there is no third alternative revealed then the reviewing court's task ends with its review of plaintiff's pretext evidence.

In this case the Ninth Circuit's first serious mistake was is trying to apply the *Reeves* Exception at all when there was

not even a hint in the record[2], let alone "conclusive" or "abundant" evidence, that any third alternative existed. There were two competing explanations: Tempesta's that three of his supervisors at Motorola to whom he had repeatedly complained of age and gender discrimination in the Purchasing Department where they all worked had conveniently created a misleading chart supposedly showing that one of two jobs (his or a co-worker's) had to be eliminated in data entry, and made the choice based on seniority, which easily targeted him as the one to go, rather than the co-worker, even though Motorola policy called for consideration of competency, which would have made the choice much harder to justify, then, during the time period when Motorola policy provided for him to find another position within the company, mysteriously the only job Motorola could offer him, in spite of his many applications and past experience in different positions, was a job which involved handling chemicals, a job Motorola knew he was adamantly opposed to taking because of his unfortunate past history of medical problems and injury while working with those same chemicals. Motorola's proffered explanation was that their chart showed they needed to let one of two workers go in data entry, Tempesta or his co-worker, they were entitled to rely on seniority to make the choice, they immediately offered Tempesta an alternative position in chemical handling and were patient and understanding in putting up with Tempesta's objections to taking that position for months and months before sadly having to fire him for job abandonment. There was never any third alternative presented and so no excuse for subjecting Tempesta to any additional evidentiary burden – weighing his explanation against Motorola's, and declaring Tempesta's to be "weak."

2. And not even a suggestion to the contrary by any of the parties, or either of the reviewing courts, that a third alternative was shown in the record.

Nonetheless, this is what the Ninth Circuit did. After (inaccurately[3]) citing to the Exception language in *Reeves*, articulating why it found Motorola's explanation for its actions to be "credible," and dismissively declining to discuss Tempesta's "other indicia of discrimination," it concluded that:

> Thus, because the record persuasively reveals "some other, nondiscriminatory reason for the employer's decision," and "the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred," *see Reeves*, 530 U.S. at 148, the district court correctly concluded that Tempesta had failed to meet his burden to establish pretext.

Pet.App. 5a. Thus Tempesta was not only subjected to an additional evidentiary burden, but he was also improperly deprived of any proper evaluation of his evidence.

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3. The court of appeals' version was:

> However, if the record persuasively (sic – not "conclusively" as this Court required) reveals "some other, nondiscriminatory reason for the employer's decision," or "the plaintiff created only a weak issue of fact as to whether the employer's reason was true and there was abundant and uncontroverted evidence that no discrimination had occurred," then the absence of a completely satisfactory explanation as to the basis of the employment actions is not enough to raise a genuine issue of material fact sufficient to avoid summary judgment.

Pet.App. 4a.

B. The Decision below Conflicts with the Holding of this Court in *Reeves* in That it Impermissibly Fails to Base the Summary Judgment Ruling on the Entire Evidentiary Record, and Makes Determinations That Are for the Jury

Based on the reasoning of the Court in *Reeves* discussed in the above section, since there was no evidence in this case of any "third alternative" to discrimination and the proffered nondiscriminatory reason, there should also, logically, have been no need for the reviewing court to go any further in its review of the evidence once a determination had been reached that Tempesta's evidence of pretext was sufficient that a rational jury could believe that Motorola's proffered reasons were pretextual.[4] In this respect the *Reeves* decision lends itself to some ambiguity – in spite of the Court's holding as to the probative force of pretext evidence in the ordinary case, and the unusual circumstances that would have to occur so before a rational factfinder could not infer discrimination from the giving of a pretextual reason, the Court not only appears to require a full review of the record to determine whether there is sufficient evidence for the jury to decide the ultimate issue of intentional discrimination, but itself conducts such a review of the facts in *Reeves*. Assuming,

4. Brandy S. Parrish, *Note: Walking an Evidentiary Tightrope: The Aftermath of Reeves v. Sanderson Plumbing Products, Inc.*, 31 U. Mem. L. Rev. 677, n.108 (2001)

> It is important to note that the Supreme Court states any other evidence which supports the employer's case, not any other evidence which supports the plaintiff's case. [referring to language in *Reeves*, 530 U.S. at 148-9] This suggests that unless there is additional evidence in favor of the employer, a jury will always be permitted to infer discrimination from the plaintiff's prima facie evidence and sufficient evidence to prove that the employer's explanation is false.

however, that under *Reeves*, a review of the evidence is necessary to specifically ascertain whether a rational jury could find intentional discrimination, then there is certainly no doubt under *Reeves* that that review must be of the entire record and undertaken with care that the jury's province is not invaded.

Reeves requires the reviewing court to review the entire record in making its ultimate determination of whether a rational jury could find intentional discrimination. Moreover,

> the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.

530 U.S. at 150-151, 120 S. Ct. at 2110, citations omitted. In this case, because the Ninth Circuit focused on the more limited review it apparently discerned as being called for under the *Reeves* Exception, it also deprived Tempesta of a decision based on the whole record, and deprived him of a decision that avoided the court substituting its own view of the evidence for the jury's.

Had the reviewing courts in this case properly considered the record as a whole, with the constraints necessary to avoid invading the province of the jury, the proper decisions would have been made both that Tempesta had sufficient evidence of pretext and that intentional discrimination could rationally be inferred from that evidence combined with his *prima facie* case.

II. The Decision Below Is Not Isolated but Represent a Trend in Misapplying *Reeves*, and the *Reeves* Exception, in the Lower Courts

After *Reeves* was decided, the scholarly commentary widely noted the potential for abuse in the language of the opinion. The language of what is referred to in this Petition as the *Reeves* Exception was particularly the target of commentary. One commentator has referred to the Exception as a "cryptic loophole"[5] with an "unusual evidentiary standard" "mysterious . . . for litigants and the lower courts" and noted the potential for "confusion" caused by the Court's "waffling" Catherine J. Lanctot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 La. L. Rev 539, 545 (2001).[6] Already in 2000 "an usually large number of courts [were] seizing" on the *Reeves* Exception language, to support not inferring (and not allowing juries to decide whether to infer) discrimination from pretext. Michael Selmi, *Why are Employment Discrimination Cases so Hard to Win?*, 61 La. L. Rev. 555, 574 and n.68 (2001).[7]

5. *See also* Marcia L. McCormick, *Truth or Consequences: Why the Rejection of the Pretext Plus Approach to Employment Discrimination cases in Reeves v. Sanderson Plumbing Establishes the Better Legal Rule*, 21 N. Ill. U. L. Rev. 355, 378, n.186 (2001) – the Exception is a "cryptic comment."

6. Also noting: "the loophole language in Reeves seems to be inconsistent with traditional evidentiary burdens in civil cases." *Id.* at 553, n.47.

7. *See also* Ryan Vantrease, *The Aftermath of St. Mary's Honor Center v. Hicks and Reeves v. Sanderson Plumbing Products: A Call for Clarification*, 39 Brandeis L.J. 747, 753-755 (2001).

> While the Supreme Court's opinion in Reeves has yet to be fully interpreted by all the circuits, it seems that, like
>
> (Cont'd)

The circuit court's decision in Tempesta is, therefore, not an aberration. Rather it is part of a trend that started almost as soon as *Reeves* was decided – and the trend continues. Nor is the Tempesta case an aberration in the Ninth Circuit. Just six days before Tempesta was decided the Ninth Circuit issued another unpublished opinion, which relied on just the same erroneous view of *Reeves*.[8] *Leeny v. Clark County*, 2001 WL 1294867 (9th Cir., October 24, 2001).[9]

(Cont'd)

> Hicks, each circuit has found language within the opinion of Reeves to support its divergent view pertaining to the level of proof which a plaintiff must provide before she may survive summary judgment in an employment discrimination action based on circumstantial evidence.

citing specifically to the *Reeves* Exception as creating "conflicting language reminiscent of Hicks" which provides, and has been used to create, just such opportunities for the circuit courts; Trevor K. Ross, *Casenote: Reeves v. Sanderson Plumbing Products: Stemming the Tide of Motions for Summary Judgment and Motions for Judgment as a Matter of Law*, 52 Mercer L. Rev. 1549, 1566 n.106 (2001) ("The limiting language found in Reeves [including the *Reeves* Exception language] presents the most likely avenue lower courts may take in the future to avoid the Reeves burden of proof standard.")

8. And also made the same error in failing to quote accurately the language from *Reeves*.

9. The Ninth Circuit has also had problems with the second principle of *Reeves* – that which requires a full review of the record without encroaching on the jury function. *Swenson v. Potter*, 271 F.3d 1184, 1198-9 (9th Cir. 2001) (The strong dissenting opinion accuses the majority of "tak[ing] the law into its own hands."

> In reversing the jury verdict, the majority has "disregarded critical evidence favorable to" Swenson, has "failed to draw all reasonable inferences in favor"

(Cont'd)

The Ninth Circuit is not alone in its erroneous interpretation of *Reeves*. In *Zapata-Matos v. Reckitt & Colman*, 277 F.3d 40, 47-8 (1st Cir 2002), the First Circuit, concluded, after comparing plaintiff's explanation with the employer's, that the employer's version was "quite credible" and that "a trier of fact could much more readily conclude that the employer's explanation was not a pretext" so that "[t]his case falls into the category *Reeves* describes [in the Exception]." The Fifth Circuit in *Price v. Federal Express Corp.*, __ F.3d __, 2002 WL 264247, *6-*7 (5th Cir, March 12, 2002), relying on the *Reeves* Exception, reasoned that plaintiff's evidence of pretext did not support the inference that intentional discrimination was the real reason for the employment decision and cited with approval to two of its earlier (post-*Reeves)* decisions, *Vadie v. Mississippi State University*, 218 F.3d 365 (5th Cir 2000), and, *Rubinstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392 (5th Cir. 2000) *cert. denied*, 532 U.S. 937, 121 S. Ct. 1393 (2001) in both of which the Fifth Circuit had ruled against the plaintiff based on a lack of any [direct] evidence of discriminatory intent, ignoring *Reeves'* teaching on the power of evidence of pretext. In *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1183 (7th Cir. 2002), the Seventh Circuit, again relying on the *Reeves* Exception language, reasoned that plaintiff "at best" "created only a weak issue of fact as to whether the employer's reason was untrue" and had "absolutely no [direct] evidence of intentional discrimination."[10]

(Cont'd)

> of Swenson, and has "impermissibly substituted its judgment concerning the weight of the evidence for the jury's." *Reeves*, 530 U.S. at 152, 120 S. Ct. [at] 2097. I dissent.

10. In addition, state courts have followed the same incorrect reasoning. Two recent examples are: *Milligan v. Thompson*, (Cont'd)

In contrast, at least the Sixth Circuit has correctly understood the *Reeves* Exception. In *Carberry v. Monarch Marking Systems*, 2002 WL 220634, *3 (6th Cir., Feb. 11, 2002), the Sixth Circuit refused to apply the *Reeves* Exception as urged by defendant, reasoning that the Exception applies where there is some third explanation (emphasizing the Court's use of "*other* nondiscriminatory reason for the employer's decision" in *Reeves*), and further noting that there was "no such ram in the bush for Monarch in this case."[11]

In her concurring opinion in *Reeves*, Judge Ginsburg states:

> I write separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs' will be required to submit evidence beyond these two categories in order to survive a motion for judgment as a matter of law.

530 U.S. at 154, 120 S. Ct. at 2112. Justice Ginsburg may have been clairvoyant in her comments.[12] And Tempesta is such an "appropriate case."

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2002 WL 398774 (Wash. Ct. App., March 15, 2002); *Hughes v. Home Savings of America, FSB*, 2002 WL 220773 (Cal. Ct. App., Feb. 13, 2002).

11. Some district courts have applied the same reasoning: *Richards v. Farner-Bocken Co.*, 145 F. Supp. 2d 978, 995 (N.D. Iowa 2001); *Leichter v. St. Vincent's Hospital*, 2001 WL 1160748, *13 (S.D.N.Y. 2001).

12. *See* Kim J. Askew, *Reeves v. Sanderson Plumbing Products, Inc. (Is Pretext-Plus Really Gone?)*, VPB0919 ALI-ABA 457, 491 (2000); David J. Turek, *Comment: Affirming Ambiguity: Reeves v. Sanderson Plumbing Products, Inc. and the Burden-Shifting Framework of Disparate Treatment Cases*, 85 Marq. L. Rev. 283, 302-303 (2001). Justice Ginsburg's concurrence is a prediction that has come true.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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